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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of) MM DOCKET NO. 92-6
)
NORMANDY BROADCASTING CORP.) File No. BRH-910129UR
)
For Renewal of License of)
Station WYLR(FM) (95.9 MHz),)
Glens Falls, New York)
)
and)
)
LAWRENCE N. BRANDT) File No. BPH-910430MB
)
For a Construction Permit for)
a New FM Station on 95.9 MHz)
at Glens Falls, New York)

To: The Review Board

MASS MEDIA BUREAU'S
EXCEPTIONS TO INITIAL DECISION

Roy J. Stewart
Chief, Mass Media Bureau

Charles E. Dziedzic
Chief, Hearing Branch

Y. Paulette Laden
Gary P. Schonman
Attorneys, Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 7212
Washington, D.C. 20554
(202) 632-6402

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Summary

The Initial Decision denied the application of Normandy Broadcasting Corp. for renewal of license of Station WYLR(FM), Glens Falls, New York. The I.D. erroneously determined that Normandy is basically unfit to remain a licensee because it failed to adequately mitigate adverse character findings made in another proceeding. In the alternative, the I.D. determined that Normandy is not entitled to a renewal expectancy.

The Bureau submits that the I.D., among other things, misinterpreted the prevailing law, reached conclusions not supported by the evidence, and held Normandy to standards which either are no longer in effect or have not yet been adopted. Singularly, and/or collectively, these matters constitute reversible error.

The Bureau urges the Review Board to reverse the Initial Decision. Normandy is indeed basically qualified to remain the licensee of WYLR(FM), and it is entitled to a renewal expectancy.

Table of Contents

	<u>Page</u>
Summary	i
Table of Contents	ii
Table of Authorities	iii
Preliminary Statement	1
Statement of the Case	1
Questions Presented	3
Argument	
The <u>I.D.</u> erred in disqualifying Normandy on the basis of adverse findings in the <u>Skidelsky</u> case	3
The <u>I.D.</u> erred in denying Normandy a renewal expectancy	9
Conclusion	15

Table of Authorities

	<u>Page(s)</u>
<u>Cases, Decisions and Rulings</u>	
<u>Deregulation of Radio</u> , 84 FCC 2d 968 (1981)	12,13, 14,15
<u>FCC v. WNCN Listener's Guild</u> , 450 U.S. 582 (1981) ..	12
<u>Formulation of Policies and Rules Relating to Broadcast Renewal Applicants</u> , 4 FCC Rcd 6363 (1989)	10
<u>Fox River Broadcasting, Inc.</u> , 93 FCC 2d 127 (1983) ..	8
<u>Simon Geller</u> , 90 FCC 2d 250 (1982); <u>recon. denied</u> , 91 FCC 2d 1253; <u>reversed and remanded on other grounds</u> , 737 F. 2d 74 (D.C. Cir. 1984)	14
<u>Hearing Designation Order</u> , 7 FCC Rcd 509 (1992)	1
<u>Initial Decision of Administrative Law Judge Edward J. Kuhlmann</u> , 6 FCC Rcd 2221 (ALJ 1991)	<u>passim</u>
<u>Initial Decision of Administrative Law Judge Richard L. Sippel</u> , FCC 92D-72 (released December 30, 1992)	<u>passim</u>
<u>KOED, Inc.</u> , 5 FCC Rcd 1784 (1990)	4
<u>Order</u> , FCC 92M-381, released March 26, 1992	1
<u>Safe Broadcasting Corporation</u> , 7 FCC Rcd 7588 (1992)	8
<u>Barry Skidelsky</u> , 7 FCC Rcd 1392 (Rev. Bd. 1992)	1
<u>Barry Skidelsky</u> , 7 FCC Rcd 1 (Rev. Bd. 1992)	2
<u>United Broadcasting Co.</u> , 49 RR 2d 597 (1981)	4
<u>West Coast Media, Inc. v. FCC</u> , 695 F.2d 617 (D.C. Cir. 1982)	10
<u>WIOO, Inc.</u> , 95 FCC 2d 974 (1983)	4,5,6

Table of Authorities (Cont.)

	<u>Page(s)</u>
 <u>Commission Rules</u>	
Sections 1.276 and 1.277	1
Sections 1.1200, <u>et seq.</u>	3
 <u>Federal Rules of Evidence</u>	
Rule 405	9

Mass Media Bureau's Exceptions to Initial Decision

Preliminary Statement

1. The Mass Media Bureau, by its attorneys and pursuant to §§ 1.276 and 1.277 of the Commission's Rules, hereby respectfully submits its Exceptions to Initial Decision of Administrative Law Judge Richard L. Sippel, FCC 92D-72 (released December 30, 1992) ("I.D."). In support whereof, the following is shown.

Statement of the Case

2. This proceeding involves the applications of Normandy Broadcasting Corp. ("Normandy"), for renewal of license of Station WYLR(FM), Glens Falls, New York, and of Lawrence N. Brandt ("Brandt"), for a construction permit for a new FM station in Glens Falls. The applications are mutually exclusive because Brandt proposes to operate on 95.9 MHz, the frequency now occupied by Normandy.

3. The Hearing Designation Order, 7 FCC Rcd 509 (1992) ("HDO"), specified only one issue against Normandy, in addition to the standard comparative and ultimate issues. The issue, as later modified,¹ provided:

To determine whether the findings and conclusions about

¹ See, Barry Skidelsky, 7 FCC Rcd 1392 (Rev. Bd. 1992); Order, FCC 92M-381 (released March 26, 1992).

the character and qualifications of Normandy Broadcasting Corp. in Barry Skidelsky, 6 FCC Rcd 2221 (ALJ 1991) should disqualify Normandy in the Glens Falls renewal proceeding.

4. The Skidelsky case was a comparative proceeding in which Normandy was an applicant for a construction permit for a new FM station in Queensbury, New York. The community of Queensbury is located in upstate New York near Glens Falls. Following an evidentiary hearing, the Presiding Judge in the Queensbury proceeding found Normandy to be basically unqualified because it had not established that it could be relied on to provide truthful information to the Commission. Initial Decision of Edward J. Kuhlmann, 6 FCC Rcd 2221 (ALJ 1991). The Review Board subsequently affirmed Normandy's disqualification on the basis that Normandy lacked reasonable assurance of a transmitter site. Barry Skidelsky, 7 FCC Rcd 1 (Rev. Bd. 1992). The Review Board did not reach decisions with respect to two other qualifying issues on which the Presiding Judge in the Queensbury proceeding had ruled adversely to Normandy.

5. The instant I.D. denied Normandy's renewal application after concluding that Normandy lacked the basic qualifications to remain a Commission licensee. The I.D. also found that Normandy was not entitled to a renewal expectancy. However, in so ruling, the I.D., inter alia, misinterpreted prevailing law, reached conclusions not supported by the facts, and applied standards that have not yet been adopted, all of which constitute

reversible error.² Accordingly, the Bureau strongly urges the Review Board to reverse the I.D.

Questions Presented

Whether the I.D. erred in disqualifying Normandy on the basis of adverse findings in the Skidelsky case?

Whether the I.D. erred in denying Normandy a renewal expectancy?

Argument

The I.D. Erred In Disqualifying Normandy On The Basis Of Adverse Findings In The Skidelsky Case.

6. The I.D.'s disqualification of Normandy in the instant case is based on the fundamentally incorrect premise that such a result is an automatic consequence of Normandy's disqualification in Barry Skidelsky, 6 FCC Rcd 2221 (ALJ 1991). Thus, the I.D.

² The I.D. also incorrectly states, at ¶ 1, that the "Commission was represented in the proceeding by the Mass Media Bureau." This represents a fundamental misunderstanding of the Bureau's role in an adjudicatory proceeding. The Chief, Mass Media Bureau is a party in this proceeding who, through his attorneys in the Hearing Branch, is appearing as an advocate before, not on behalf of, the Commission. The distinction is more than mere semantics. For example, Bureau counsel are held to the same ex parte rules to which other parties in this proceeding are subject. Thus, while it is lawful for Bureau counsel to discuss the merits of this case with counsel for the other parties, similar discussions between Bureau counsel and Commission staff are strictly prohibited. See § 1.1200 of the Commission's Rules, et seq.

incorrectly states, at ¶ 51:

Therefore, with [the Skidelsky] findings and conclusions as a given, if the inquiry should end here, Normandy would be disqualified on grounds of character.

The Bureau submits that disqualification here is not warranted, much less compelled.

7. The Commission has observed that "a broadcaster's loss of one license does not invariably compel the conclusion that grant of another license to that same broadcaster would be contrary to the public interest." United Broadcasting Co., 49 RR 2d 597, 602 (1981); see also, KOED, Inc., 5 FCC Rcd 1784 (1990). Indeed, in WIOO, Inc., 95 FCC 2d 974 (1983), a case remarkably similar to the instant proceeding, the Commission declined to deny a license renewal based on misconduct found in another proceeding.³

8. In WIOO, as here, the misconduct occurred in an isolated context. Furthermore, both cases involved incumbent licensees which had been applicants for other, new facilities. The Bureau recognizes that the misrepresentation and lack of candor found in the Skidelsky case concerned, at least in part, a threshold showing of the programming broadcast on the facility at issue here. However, the exaggerated claims which formed the basis for

³ Although in WIOO the Commission assessed a comparative demerit against the licensee (consistent with then-prevailing procedures), the Commission nonetheless determined that the licensee was basically qualified.

the conclusions in Skidelsky were confined to that proceeding. Moreover, notwithstanding the I.D.'s conclusions to the contrary, as will be discussed below, there has been no misconduct in the instant proceeding. Further, as was the case in WIOO, there is no evidence that any misconduct has ever attended the operation of Normandy's AM and FM stations in Glens Falls,⁴ or that Normandy has ever wilfully failed to comply, in any meaningful way, with the Commission's rules and policies. Finally, the record here simply does not support a conclusion that the misconduct found in Skidelsky has ever recurred, or that it is likely to be repeated.

9. The I.D. justifies the result in the instant case as follows:

[I]t is not the fact of denying Normandy's application in Skidelsky that warrants a denial of renewal in Glens Falls. Rather, the findings and conclusions in Skidelsky establish misrepresentations which under principles of collateral estoppel as applied by the Review Board to this case cannot be litigated here. The failure of the burden of proof on the part of Normandy to mitigate those misrepresentations is the proximate cause for a denial of renewal here. Thus, the denial of a construction permit for a new FM facility in Skidelsky is irrelevant to whether or not Normandy has shown through mitigation evidence that it will be trustworthy in its dealings with the Commission.

I.D. at ¶ 64 (emphasis added). This language suggests that the I.D. elevated Normandy's "opportunity" to present mitigating

⁴ Normandy is also the licensee of Station WWSC(AM), Glens Falls, New York, sister station to WYLR(FM).

evidence to a "burden," and then disqualified Normandy for failing to meet this "burden." If this were the case, Normandy's disqualification constitutes error, not to mention a denial of due process. Clearly, under the Skidelsky issue, Normandy had the burden of proving itself qualified to continue operating WYLR. That burden could be sustained in any number of ways, only one of which is mitigation. But there was no separate "mitigation" issue under which Normandy had the burden of proof. The issue here sought to determine whether the findings in the Queensbury proceeding warranted Normandy's disqualification in the Glens Falls proceeding. Therefore, not only are the conclusions in Skidelsky relevant, they are the sole reason for the inquiry here. At the same time, disqualification here was not mandated by the mere fact of disqualification in Skidelsky, nor would disqualification have been compelled even if Normandy had failed to present any evidence of mitigation or exculpation. Rather, consistent with WIOO, the I.D. was required to determine, on the basis of the totality of the evidence, whether, in view of the conclusions reached in Skidelsky, Normandy lacks the character qualifications to remain the licensee of the instant facility. Had the I.D. properly done so, it would have determined that Normandy does not lack the basic qualifications to be the licensee of WYLR solely on the basis of the conclusions reached in Skidelsky.

10. In concluding that Normandy is not trustworthy, the

I.D. makes much of what it characterizes as "improper tampering" with an affidavit. I.D. at ¶ 32. The Bureau disagrees entirely with that characterization. At one isolated point in the hearing, questions were justifiably raised over a typewritten letter of accommodation for Normandy's co-owned Station WWSC(AM) which curiously bore the handwritten word "WYLR." Normandy principal Christopher Lynch readily explained that he was responsible for having made the handwritten notation and that the letter had inadvertently been included among his exhibits in the instant proceeding. (Tr. 290-291). There was no evidence whatsoever of any intent to deceive or of any other type of wrongdoing in this connection, and the matter is hardly the type on which the overall trustworthiness of a licensee should be judged. Indeed, it seems unduly harsh for the I.D., on the basis of what appears to have been a mere clerical oversight which drew only brief attention at the hearing, to render the "death penalty" on Normandy's continued operation of WYLR(FM). At best, it appears that the I.D. was straining to use this matter as justification for reaching an adverse determination on Normandy's qualifications which would be consistent with the Presiding Judge's conclusions in the Queensbury proceeding.

11. The I.D. also unfairly characterizes apparent imperfections in Normandy's issues/programs lists. In the absence of a public file issue, the I.D. concludes that "WYLR(FM) was in non-compliance with the [public file] rule," and

that "[b]ased on the experience the Commission has had with Normandy's issues/programs lists both in Skidelsky and in this case, it is likely that Normandy and Lynch will continue to be less than candid with respect to Station WYLR(FM) in the future." I.D. at ¶¶ 72-73. There is, however, no evidence in this proceeding of a lack of candor with respect to the preparation or production of Normandy's issues/programs lists. To the contrary, Lynch freely acknowledged that his quarterly lists contained errors or omissions, as the I.D. recognized at ¶¶ 25-26, 58. Even assuming, arguendo, that there was a public file issue specified against Normandy, the Bureau submits that in the absence of a showing of intent to deceive, the I.D.'s conclusion, at ¶ 73, that Normandy lacked candor concerning its issues/programs lists is erroneous. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). In fact, absent evidence of bad faith on Normandy's part, the I.D. simply makes too much of a technical non-compliance with the public file rule. See Safe Broadcasting Corporation, 7 FCC Rcd 7588 (1992).

12. Finally, the Bureau disagrees with the I.D. which, at ¶ 33, accorded little or no weight to testimonials proffered by Normandy in mitigation simply because there was no evidence to show that the authors were aware of the negative findings in Skidelsky. There is no requirement that the author of a testimonial be aware of specific misconduct. On the contrary, reputation evidence offered to mitigate misconduct is intended to

show precisely the opinion held with respect to the wrongdoer in areas distinct from the wrongdoing. Cf. Fed R. Evid. 405.

The I.D. Erred In Denying Normandy A Renewal Expectancy.

13. The Bureau submits that Normandy is entitled to a renewal expectancy and that the I.D.'s contrary conclusion is erroneous. First, the I.D. treats language in the Skidelsky case as "evidence" to support the "conclusion that WYLR has never presented a bona fide nonentertainment programming format that could qualify for a substantial renewal preference." I.D. at ¶ 70. The Skidelsky issue specified here, and clarified by the Review Board, deals strictly with Normandy's character qualifications. There was no renewal expectancy issue in Skidelsky. It is inappropriate to rely on conclusions reached about a station's programming under a misrepresentation issue in one case in order to deny a renewal expectancy in a different case.

14. The I.D. also based its denial of a renewal expectancy, in large part, upon Normandy's alleged non-compliance with issues/programs list requirements. However, as discussed above, there was no public file issue specified against Normandy, and no violation of the Commission's rules in this respect has been previously found. Moreover, even though the preparation and production of Normandy's issues/programs lists might be relevant

under the renewal expectancy issue, it was error, in the absence of an issue, for the I.D., at ¶ 73, to find that Normandy was lacking in candor. West Coast Media, Inc. v. FCC, 695 F. 2d 617 (D.C. Cir. 1982).

15. The I.D. goes on to fault Normandy, under the renewal expectancy issue, because shortcomings in its issues/programs lists "defeat a proposed policy." I.D. at ¶ 74. This conclusion is totally lacking in precedential support. There is no basis whatsoever for evaluating an applicant under a policy which is merely under consideration and might never be adopted. Simply because the Commission requests comments on a certain idea in a Notice of Proposed Rulemaking does not render the matter "Commission policy." Here, in addition, the applicant was afforded no notice that it was to be evaluated under a new standard.⁵

⁵ Even as a proposed policy, the standard is misapplied by the I.D. In Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 6363, 6365 (1989), the Commission discussed the idea of changing the order of proof so as to shift the burden of proving meritorious service away from the incumbent and placing upon the competing applicant the burden of proving a failure to provide meritorious service. Thus, upon presenting prima facie evidence of meritorious service, the licensee would be entitled to a rebuttable presumption in favor of a renewal expectancy. Only if such evidence were insufficient or if the presumption was rebutted by the challenger, would a comprehensive showing of entitlement to a renewal expectancy be required of the incumbent. The Commission requested comment on the types of evidence which would constitute a prima facie showing, indicating only that "initial thinking" pointed to issues/programs lists. From this, the I.D. has concluded that the fact that Normandy did not establish the existence of reliable issues/programs lists requires the absolute denial of a renewal expectancy. This plainly turns the proposed policy on

16. The I.D. further concludes that Normandy is not entitled to a renewal expectancy because of a "Failure to Prove a Substantial Format." I.D. at ¶¶ 75-79. There is no precedent for such a requirement, per se. The conclusion appears to be based on various components which, as discussed below, are misplaced.

17. First, at ¶ 75, the I.D. concludes that "WYLR did not broadcast nonentertainment programs (as distinguished from newscasts and PSAs)." Of course PSAs and newscasts are nonentertainment programs, and they are properly part of a renewal expectancy showing. Moreover, as the I.D. later concedes, at ¶ 77, Normandy also broadcast live remotes which it considers public affairs programming.

18. It is also clear that the I.D. impermissibly injected value judgments concerning Normandy's programming in determining that Normandy was not entitled to a renewal expectancy. For example, the I.D. states:

The Bureau⁶ has marshalled evidence which does not meet

its head.

⁶ Here, and in ¶ 77, the I.D. appears to misinterpret the Bureau's role with respect to renewal expectancy evidence. The Bureau did not "marshall evidence," or "represent" the nature of Normandy's programming. The showing was made exclusively by Normandy. The characterization with respect to the Bureau may be the result of the Bureau's description of the record evidence as

the definition of "substantial" because the format of WYLR remains essentially music directed towards young persons. That constriction of the programming limits considerably the universe of the ascertained community needs of WYLR's audience. And the format admittedly excludes nonentertainment programming that is "substantially above" newscasting, weather forecasting, fund raisers and PSAs.

I.D. at ¶ 76 (footnote added). Thus, the I.D. faults Normandy for its choice of program format, a consequence totally contrary to precedent. See FCC v. WNCN Listener's Guild, 450 U.S. 582 (1981). It is well settled in this regard that a showing that programming is "well balanced" is not required. Deregulation of Radio, 84 FCC 2d 968, 988 (1981). Moreover, there is absolutely no evidence in the record to even suggest that WYLR's format "limits considerably the universe of the ascertained community needs of WYLR's audience." I.D. at ¶ 76.

19. The I.D.'s denial of a renewal expectancy is also based on an apparent aversion for the type of nonentertainment programming broadcast by Normandy. Thus, the I.D. concludes:

The bulk of the evidence presented by Normandy that related specifically to WYLR was in the form of narrative testimonial accounts and which focused primarily on newscasts, weather reports, weather warnings, and fund raisers or narrow onetime community events such as anti-substance abuse projects. For example, there was no evidence of nonentertainment talk programming

I.D. at ¶ 78. It would appear from the foregoing that Normandy's

set forth in our Proposed Findings of Fact and Conclusions of Law, which, of course, is not "evidence."

programming was found deficient, not because it failed to address ascertained community issues, but because it was not of a certain type. This is plain error.

20. In Deregulation of Radio, supra, the Commission made clear that licensees would be afforded vast flexibility to address community issues as they saw fit:

Other than issue responsive programming, stations need not, as a Commission requirement, present news, agricultural, etc., programming.

.

We do expect, and will require, radio broadcasters to be responsive to the issues facing their community. However, in determining which issues to cover, commercial radio broadcasters may take into account their listenership and its interests, and the services provided by other radio stations in the community to groups other than their own listenership.

.

The focus of our inquiry, in the case of a challenge, will be upon whether the licensee's judgment in this regard was reasonable.

.

No station, however, will be forced into a rigid mold and we will not endeavor to dictate the types of programs that must be used to respond to community issues

84 FCC 2d at 978-79. See also 84 FCC 2d at 983, 988, 989.

21. The I.D. was also wrong to the extent that it objected to the type of evidence relied upon by Normandy to support its claim to a renewal expectancy. The renewal expectancy showing

can be made "by almost any means." Deregulation of Radio, supra, at n. 53.

22. Finally, and most significantly, the ID erred in holding, at ¶ 77, that Normandy's nonentertainment programming cannot be considered "substantial" because it was not possible to determine the percentage of broadcast time devoted to such programming. In Deregulation of Radio, supra, the Commission explicitly rejected the continued use of "numbers games" in evaluating renewal expectancy:

[W]e do not believe that it is advisable or necessary to specify precise quantities of programming that should be presented by all stations regardless of local needs and conditions.

. . . .

[S]tations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented.

84 FCC 2d at 983. The Commission recognized that quantitative standards are not helpful because increasing the amount of programming does not necessarily improve the quality of the service provided. 84 FCC 2d at 985-86.

23. Despite the foregoing policy, which has been in effect for over a decade, the I.D. nonetheless evaluated Normandy's renewal expectancy under a quantitative standard by relying on Simon Geller, 90 FCC 2d 250 (1982); recon. denied, 91 FCC 2d


1253; reversed and remanded on other grounds, 737 F.2d 74 (D.C. Cir. 1984). However, Simon Geller was governed by policies which existed before the adoption of Deregulation of Radio, supra. See 90 FCC 2d at 252, n. 8. Simply put, in denying Normandy a renewal expectancy, the ID relied upon precedent which employed an outdated standard of review.

Conclusion


24. The nature and extent of the ID's errors in analyzing the evidence and applying the prevailing law cast grave doubts on the soundness of its conclusions and the ultimate resolution of this case. A remand clearly is not warranted because the record that was developed at hearing fully addressed all of the specified issues. Normandy is basically qualified to be a

Commission licensee, and it is entitled to a renewal expectancy.
Accordingly, the Review Board should reverse the I.D.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau


Charles E. Dziedzic
Chief, Hearing Branch


Y. Paulette Laden


Gary P. Schonman
Attorneys
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 632-6402

January 29, 1993

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 29th day of January, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Exceptions to Initial Decision" to:

David Tillotson, Esq.
3421 M Street, NW, Suite 1739
Washington, DC 20007

Christopher P. Lynch
President
Normandy Broadcasting Corp.
217 Dix Avenue
Glens Falls, NY 12801



Michelle C. Mebane